

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. In a May 14, 2009 decision, the Board set aside an Office decision finding that Dr. Robert Dennis, a Board-certified orthopedic surgeon and impartial medical examiner, did not provide an impairment rating for appellant's right leg that conformed the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5<sup>th</sup> ed. 2001). The Board remanded the case to the Office to request a supplemental opinion from Dr. Dennis.<sup>2</sup> The facts as contained in the prior decision are incorporated by reference.

In a June 26, 2009 letter, the Office referred appellant for reexamination by Dr. Dennis. In his July 7, 2009 report, Dr. Dennis reviewed appellant's history of injury and treatment and provided findings on examination. He utilized the A.M.A., *Guides*, (6<sup>th</sup> ed. 2009) to rate 14 percent permanent impairment of the right leg. Dr. Dennis subsequently received updated x-rays and provided an addendum dated August 5, 2009. He opined that appellant had 16 percent impairment of the right leg. In an August 23, 2009 report, an Office medical adviser reviewed Dr. Dennis' report and concurred with his findings.

By decision dated September 1, 2009, the Office found that the evidence did not establish that appellant had more than 26 percent impairment of his right leg for which he previously received schedule awards.

On January 4, 2010 counsel requested reconsideration. He submitted a December 18, 2009 report from Dr. David Weiss, an osteopath, who utilized the A.M.A., *Guides* and provided an impairment rating for appellant. Dr. Weiss referred to Table 16-3, Table 16-6 and Table 16-7<sup>3</sup> to determine that appellant had Class 4 right primary knee joint arthritis due to a total collapse of the medial compartment. He utilized grade modifiers for functional and physical findings of one and the net adjustment formula. Dr. Weiss opined that appellant had 50 percent impairment of the right leg under the sixth edition of the A.M.A., *Guides*.

By decision dated April 5, 2010, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence.

## **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>4</sup> the Office's regulations provide that the evidence or argument submitted by a claimant must:

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<sup>2</sup> Docket No. 08-1767 (issued May 14, 2009). In a January 7, 2002 decision, the Board found that an impartial medical examiner did not resolve a medical conflict regarding permanent impairment of the right leg and directed that the Office to obtain a supplemental report from the impartial specialist. Docket No. 00-1935 (issued January 7, 2002).

<sup>3</sup> A.M.A., *Guides* 511, 516-17.

<sup>4</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." *Id.* at § 8128(a).

(1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>5</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>6</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>7</sup>

### ANALYSIS

Appellant disagreed with the denial of his claim for a schedule award and his representative requested reconsideration on January 4, 2010.

Counsel does not make any argument that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. He submitted a new medical report, dated December 18, 2009, in which Dr. Weiss provided findings, utilized the sixth edition of the A.M.A., *Guides* and opined that appellant had 50 percent impairment of the right leg. The Office denied reopening appellant's case on the merits, finding that Dr. Weiss' report was brief, did not provide a history or objective findings and did not contain rationale to support the stated rating. However, the Board finds that the report of Dr. Weiss is new and relevant. In the September 1, 2009 decision, the Office denied appellant's claim for an increased schedule award finding the medical evidence was insufficient to establish more than a 26 percent impairment of his right leg. Dr. Weiss' December 18, 2009 report is new and it is relevant to the point at issue, right leg impairment, as he supported 50 percent impairment and referenced provisions in the sixth edition of the A.M.A., *Guides*. The issue of whether his report is based on a proper history or whether it is sufficiently reasoned would go to the weight of the evidence, which goes beyond the standard to be applied to reopen a case for further review of the merits. The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge his or her burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.<sup>8</sup> Accordingly, the case must be remanded for the Office to conduct a merit review of the claim.

On appeal, appellant's representative argued that the report of Dr. Weiss was supportive of a greater impairment and questioned whether the report of the impartial medical examiner was entitled to special weight. Consideration of such matters is premature as the Board does not have jurisdiction over the merits of the claim.

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<sup>5</sup> 20 C.F.R. § 10.606(b)(2).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(b).

<sup>8</sup> See *Sydney W. Anderson*, 53 ECAB 347 (2002).

**CONCLUSION**

The Board finds that the Office improperly denied a reopening of appellant's case for a review of the merits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 5, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision.

Issued: April 12, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board